Supreme Court, U.S.
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No. 02-924

IN THE

United States Supreme Court

MULVANEY MECHANICAL, INC.,

Petitioner,

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 38,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit properly conclude, in accord with the First, Ninth and Tenth Circuits, that Mulvaney's equitable defense of repudiation could be resolved by the arbitrators, pursuant to the parties agreement to arbitrate.

2. Are the First, Ninth and Tenth Circuit precedents relevant to this case, when, unlike this case, the change in position occurred in the District Court case under review and, unlike this case, the court intervention occurred before, not after, the arbitration proceeding.

3. Is the Second Circuit's decision in this case in accord with this Court's opinion in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962).

4. Is the Second Circuit's decision in this case in accord with this Court's opinion in *Howsam v. Dean Witter Reynolds, Inc.*, ___ U.S. ___, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).

5. Is the Second Circuit's decision in this case in accord with national labor policy.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption. Pursuant to S.Ct. Rule 29.6, respondent notes that it is an unincorporated association and does not have any corporate affiliations.

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COUNTER STATEMENT OF THE CASE

The Unrelated District Court Case

Petitioner Mulvaney Mechanical, Inc.'s (Mulvaney) Statement of the Case is inaccurate or misleading in several important respects. Petitioner contends that,

> "Local 38 consistently maintained that the expiration of the agreement rendered the entire agreement, including the interest-arbitration provision, a dead letter. The union, in fact, openly repudiated the agreement in federal court just days after the strike commenced." Petition for a Writ of *Certiorari* (PWC), page 6.

This inaccuracy results from petitioner's misunderstanding of what was at issue in the unrelated District Court proceeding. A multi-employer association, not Mulvaney, was seeking an injunction under *Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Respondent, Sheet Metal Workers International Association, Local 38's (Local 38) defense was that a required ingredient for a *Boys Markets, supra*, injunction, a dispute resolving arbitration clause, was absent.

It was missing as Local 38 was not required to continue the multi-employer bargaining unit. It has long been "black letter" National Labor Relations Board (NLRB) law that the continuation of a multi-employer bargaining unit must have the consent of the union and the employers, see *Retail Associates*, 120 N.L.R.B. 388, supplemented 120 N.L.R.B. No. 66A (1958); *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000).

The point is that Local 38 did not, in that unrelated District Court proceeding, repudiate the agreement. Local 38's position was that the interest arbitration provision did not apply to the multi-employer association with whom Local 38 had lawfully decided not to bargain in the future. District Judge Covello obviously agreed with Local 38 as he refused to issue an injunction.

Local 38's Strike

Several of petitioner's statements regarding the strike are either misleading or speculative. Petitioner states that Local 38 thought "that the collective bargaining strength of the multi-employer Association was too strong" and for that reason decided to terminate the multi-employer bargaining unit, PWC, p. 5-6.

Petitioner is engaging in outright speculation. Local 38's reasons for terminating the multi-employer bargaining unit do not appear in the record of the

unrelated District Court case, 3-97-cv-1302 (AVC) (D.C.Ct. 1997), or in the National Labor Relations Board proceeding that certified Local 38 as the exclusive collective bargaining representative of Mulvaney's sheet metal workers, 328 N.L.R.B. 370 (1999). Nor do they appear in the unreported Court of Appeals decision that enforced the NLRB's Order against Mulvaney, 2000 U.S.App. Lexis 29320 (2nd Cir. 2000) or the Court of Appeals decision which Mulvaney attacks in its *Certiorari* Petition, 288 F.3d 491 (2nd Cir. 2002). In fact, the Association was weak, not strong, and Local 38's reasons for ending the bargaining relationship had nothing to do with its strength or lack of it.

Mulvaney misleads the Court when it states that, "Yet by this time - five months after Local 38 first struck - Mulvaney had moved on." PWC, p.8. The implication is that Mulvaney had sustained a devastating five month strike by Local 38. In fact, Local 38 was willing to end the strike after just a few days. However, Mulvaney had decided to take advantage of the situation to become a non-union sheet metal contractor. Mulvaney elected almost immediately to hire permanent replacement workers; to refuse to take back the strikers; to operate as a non-union sheet metal contractor and to pay lower wages and benefits to its sheet metal workers. Mulvaney has benefitted, not endured.

Local 38 did not, as portrayed by Mulvaney, consistently repudiate the agreement. Local 38 took the

position that the agreement was terminated only very briefly during the NLRB representation case administrative proceeding, 34-RC-1517 (NLRB, Reg. 34, 1998). Local 38's position was rejected by the Hearing Officer.

> "Although neither party sought to invoke the interest arbitration provisions at the time the strike began, it would appear from the language of the contract that the provisions were applicable to the parties, including the prohibition on strikes and lockouts until the provisions had been fulfilled."

> "I find that the provisions of Article X Section 8 (the provision requiring arbitration) were clearly applicable to the Employer and to Petitioner (Local 38). Accordingly, although both parties were free to mutually agree to terminate the contract and their relationship, neither party was free to act unilaterally." Both quotations are from p. 12 of the Hearing Officers's Report and Recommendations, dated April 24, 1998, 34-RC-1517 (NLRB, Reg. 34, 1998) found at p. A161, Joint Appendix of the Second Circuit appeal, at issue, Docket No. 00-7546.

Local 38 did not consistently repudiate the collective bargaining agreement or the arbitration clauses contained in the contract. It only did so during the NLRB administrative proceeding and its position was not adopted by the NLRB.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT OF CIRCUITS ON THE QUESTION OF WHETHER THE ARBITRATORS OR THE COURT SHOULD RESOLVE CERTAIN EQUITABLE DEFENSES, SUCH AS REPUDIATION.

In this case, the Second Circuit concluded that Mulvaney's equitable defense of repudiation could be resolved by the arbitrators, pursuant to the parties agreement to arbitrate. The First, Ninth and Tenth Circuits take the same position, but create an exception to this rule when the repudiation occurs in the District Court proceeding that is under review. Since that didn't happen in this case, the Second Circuit was not presented with the question of whether or not it need follow the exception to the rule adopted by the other three Circuits. In short, there is no conflict of Circuits.

Mulvaney points to the Tenth Circuit's decision in *Reid Burton Constr., Inc. v. Carpenters Distr. Council*, 535 F.2d 598 (10th Cir.), cert.den. 429 U.S. 907 (1976). The change in position in that case occurred

within the District Court case under review, not so in this case.

Another distinguishing point of difference between *Reid Burton Constr., supra*, and indeed all of the First, Ninth and Tenth Circuit cases cited by the petitioner and this case, is that in the cited cases the courts were resolving the issue of the obligation to arbitrate before the matters had proceeded to arbitration. In this case, the courts were reviewing the obligation of Mulvaney to arbitrate after the arbitrators had already found that they were empowered to determine the matter. By not moving, in court, to block the arbitration proceeding, Mulvaney was acquiescing in Local 38's decision to have the arbitrators decide their defenses.

Petitioner also points to the Ninth Circuit's decision in *California Trucking Ass'n. v. Board of Teamsters Local 70*, 679 F.2d 1275 (9th Cir.), cert.den., 459 U.S. 970 (1982). Yet, again in this case, the change in position occurred in the District Court case under review. Again, the court intervention occurred before, not after, the arbitration proceeding.

Mulvaney's banner First Circuit case actually supports Local 38's position, *Jones Motor Co. v. Teamsters Local 633*, 671 F.2d 38 (1st Cir.), cert.den., 459 U.S. 943 (1982), although the case involves a union's waiver of arbitration, not an alleged repudiation of the agreement. As in the Ninth and Tenth Circuit

cases, the court intervention occurred before, not after, ny arbitration proceeding. Justice, then First Circuit dge Breyer, spells out why that matters.

> "In these three cases, Flair Builders, General Dynamics, and H. & M. Cake Box, the conduct that allegedly amounted to a waiver or equivalent arbitration bar occurred before the court complaint was filed and involved issues well suited to an arbitrator's expertise (such as what facts occurred or whether those facts, under the contract's standards, should bar arbitration). In contrast, the conduct allegedly constituting waiver here simply consists of a failure to seek arbitration while acquiescing in court resolution of the dispute. These facts took place after the complaint was filed; and the question of whether they amount to waiver calls for the expertise of a judge, not an arbitrator. Moreover, to require that parties go to arbitration despite their having advanced so far in court proceedings before seeking arbitration would often be unfair, for it would effectively allow a party sensing an adverse court decision a second chance in another forum." 671 F.2d 38, 43.

In this case, the events at issue took place "before the court complaint was filed and involved issues well suited to an arbitrator's expertise (such as" did Local 38 repudiate the agreement and did Local 38 repudiate the

arbitration clause. Local 38 did not acquiesce in a court proceeding in place of an arbitration. Further, it is Mulvaney that seeks to have Judge Breyer's "second chance in another forum."

The First Circuit does touch upon the issue of repudiation. It cites its own decision in *H. & M. Cake Box, Inc. v. Bakery Workers Local 45*, 493 F.2d 1226 (1st Cir. 1974) for the proposition that a strike by a union is not a repudiation of the arbitration clause, which would relieve an employer from its duty to arbitrate. 671 F.2d 38, 43.

The Second Circuit's decision in this case is not at odds with those of the First, Ninth and Tenth Circuits. Those Circuits and the Second Circuit have the same basic rule regarding the assertion of certain equitable defenses to the duty to arbitrate. They are to be decided by the arbitrators.

It is also clear that First, Ninth and Tenth Circuit cases selected by the Petitioner are distinguishable from this case on their facts. They all involved changes in position, which occurred in the District Court case under review. They all involved court intervention occurring before, not after, the arbitration proceeding. As the cases are distinguishable, they are not in conflict.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Drake Bakeries

The precedent in this Court that most closely resembles the instant matter is *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962).

In *Drake Bakeries, supra*, the District Court concluded that the union's breach of the no strike clause contained in the collective bargaining agreement was a matter subject to arbitration. A panel of the Second Circuit reversed the District Court, but after an *en banc* rehearing, the Second Circuit affirmed the District Court, 294 F.2d 399. This Court affirmed.

The employer in that case similarly contended that the union's violation of the no strike clause released the employer from its contractual obligations.

> "The company further asserts that even if it agreed in the contract to arbitrate union violations of the no-strike clause, it is excused by the union's breach from pursuing the post-breach remedies called for in the contract. The company does not deny that grievance and arbitration

> procedures under this contract--as is true generally (United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409)--contemplate as a matter of course the arbitration of many alleged breaches of contract. Indeed, central to the company's position is its assertion that the union was bound to arbitrate, rather than strike over, its claim that the company breached the contract by scheduling Saturday work. But in its view, the union's violation of the no-strike clause is sui generis and so basic to what the employer bargained for in the contract and so inherently and 'fundamentally inconsistent with' the grievance and arbitration procedures that the faithful observance of the no-strike clause by the union is a condition precedent to the employer's duty to arbitrate (even though he has promised to do so), or that the union must be deemed to have waived, or to be estopped from asserting, its right to arbitrate." 370 U.S. 254, 260-261, 82 S.Ct. 1346, 1350.

Drake Bakeries' contention was essentially the same as the Employer in this case. The union's breach of the no strike clause is so fundamental a breach of the agreement that Drake Bakeries may repudiate its

obligation to arbitrate. Mulvaney's contention in this case is even broader. Mulvaney contends that Local 38's breach of the no strike clause is so fundamental a breach of the agreement that the Employer may repudiate the contract in its entirety. The Supreme Court rejected this view and stated that:

> "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach." 370 U.S. 254, 262, 82 S.Ct. 1346, 1351.

The District Courts continue to read *Drake Bakeries, supra*, in this fashion.

> "Even where a party ceases to perform its obligations under a contract--and is unjustified in doing so--such nonperformance does not per se amount to a repudiation. Id. at n. 6, quoting 6 Corbin, Contracts § 1443 (1961 Supp., n. 34, pp. 192-193). Cf. Chesapeake and Potomac Telephone Co. v. National Labor Relations Board, 687 F.2d 633, 638 (2d Cir.1982); Abrams v. Carrier Corp., 434 F.2d 1234, 1246- 47 (2d Cir.1970)." *Fraternal Order of Police v. United States Postal Service*, 988 F.Supp. 701, 711 (S.D.N.Y. 1997). Accord: *Forestall, Inc. v. M/V Sersou*,

1998 WL 414935 *3 (S.D.N.Y.).

Admittedly, Drake Bakeries did not seek to terminate the entire contract as has the Employer in this case. However, the Petitioner in this case continued to negotiate with Local 38, even after the July 1, 1997 strike and before the National Labor Relations Board certified Local 38 as the exclusive bargaining representative on October 14, 1998. Thus, both parties did not repudiate the negotiation process under Article X, Section 8 of the collective bargaining agreement. The parties, by their conduct, put this case squarely under the holding of *Drake Bakeries, supra.*

> "Moreover, in this case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise." 370 U.S. 254, 261-262, 82 S.Ct. 1346, 1351.

Local 38 and the Employer intended not to repudiate the negotiation and arbitration process contained in Article X, Section 8 of the collective bargaining agreement. Local 38 submitted the negotiation dispute for a determination by the National Joint Adjustment Board of the Sheet Metal Industry (NJAB), as the parties had agreed to do. The NJAB issued an award. The Second Circuit's decision in this case is in complete accord with this Court's decision in *Drake Bakeries, supra.*

Howsam v. Dean Witter

The Second Circuit opinion in this case is also in accord with this Court's recent opinion in *Howsam v. Dean Witter Reynolds, Inc.*, ___ U.S. ___, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). This Court held that an arbitrator, not a court, decides the application of a limitations clause to a Securities Industry arbitration agreement. "[T]he arbitrator should decide 'allegations of waiver, delay or a like defense to arbitrability.' Moses H. Cone Mem. Hosp. supra, at 24-25." 123 S.Ct. 588, 592.

Repudiation is a similar defense that requires the evaluation of an arbitrator. The arbitrator should evaluate whether there has been a repudiation of the agreement and particularly, whether there has been a repudiation of the arbitration clause, as required by *Drake Bakeries, supra.* Arbitrators are better able than judges to interpret the actions of unions and employers

in the context of a labor dispute.

III. THE SECOND CIRCUIT DECISION REFLECTS NATIONAL LABOR POLICY.

> "In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S.Rep. No. 105, 80th Cong., 1st Sess. 17). It was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes' (Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972). The preferred method for settling disputes was declared by Congress to be '(f)inal adjustment by a method agreed upon by the parties' (§ 203(d) of the Act, 29 U.S.C. s 173(d), 29 U.S.C.A. s 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566, 80 S.Ct. 1343, 1345, 4 L.Ed.2d 1403). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing

> influence of the collective bargaining contract in a situation such as this." *Drake Bakeries,* 370 U.S. 254, 263-264, 82 S.Ct. 1346, 1352.

Mulvaney puts forward a doctrine that has the effect of eliminating strike resolution mechanisms. The underlying *rationale* of *Drake Bakeries, supra,* is that strike resolution mechanisms must be preserved, except under the most extreme circumstances. The Second Circuit decision in this case is faithful to that *rationale.*

CONCLUSION

There is no conflict of Circuits on the question of whether the arbitrators or the court should resolve certain equitable defenses, such as repudiation. Further, the current case is distinguishable from the First, Ninth and Tenth Circuit cases offered by petitioner.

The Second Circuit's decision in this case is in accord with this Court's opinions in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l,* 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962), and *Howsam v. Dean Witter Reynolds, Inc.*, ___ U.S. ___, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).

The underlying *rationale* of *Drake Bakeries, supra,* is that strike resolution mechanisms must be preserved, except under the most extreme circumstances.

The Second Circuit decision in this case is faithful to that *rationale.*

Petitioner's motivation is to be a non-union sheet metal contractor. That position has already been rejected by the arbitrators of the National Joint Adjustment Board of the Sheet Metal Industry, the National Labor Relations Board, and twice more by the Judges of the United States Court of Appeals for the Second Circuit. This Court is urged to leave these determinations undisturbed. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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